TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 237.

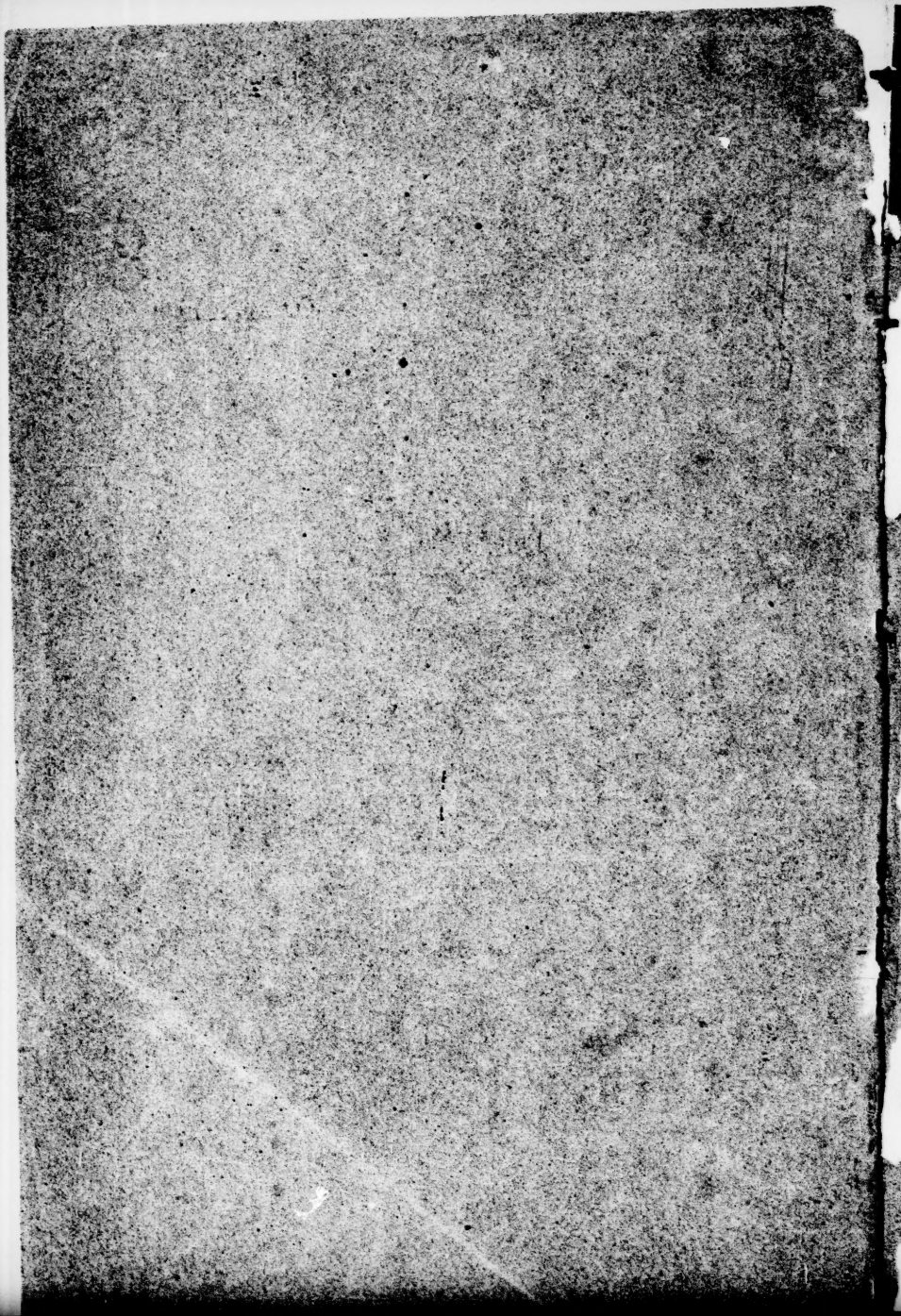
THOMAS C. JENKINS, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF CHARLESTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED OCTOBER 16, 1875.



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1 UNITED STATES OF AMERICA:

The President of the United States of America to the justices of the supreme court of the State of South Carolina, the same being the highest judicial tribunal in the said State, and the court of the last resort for the correction of errors in all suits, both at law and in equity, in all the inferior courts of said State, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea and suit which is in said supreme court for the correction of errors and the final decision of all suits from the inferior courts of said State, before you, between Thomas C. Jenkins and the City Council of Charleston, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error has happened, to the great damage of the said Thomas C. Jenkins, as by his complaint appears: and it being fit that the error, if any has been, should be duly corrected, and full and speedy justice done to the party afore-

2 said in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right and according to law and the custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Allowed.

M. R. WAITE,
Chief-Justice Sup. Ct U. S.

JULY 29, 1875.

(Indorsed:) United States of America. Thomas C. Jenkins, plaintiff in error, *vs.* The City Council of Charleston, defendant in error. Writ of error from Supreme Court of the United States to the supreme court of the State of South Carolina.

Filed 20 August, 1875.

ALBERT M. BOOGER,
Clerk Supreme Court S. C.

3 The United States of America to the City Council of Charleston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the *the* supreme court of the State of South Carolina, wherein Thomas C. Jenkins is plaintiff in error, and you are defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not

be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Noah H. Swayne, a Justice of the Supreme Court of the United States, this seventeenth day of August, in the year of our Lord one thousand eight hundred and seventy-five.

N. H. SWAYNE.
Asso. Jus. Sup. Court U. S.

(Indorsed:) Citation.

Filed 21st Aug., 1875.

ALBERT M. BOOZER,
Clerk Supreme Court S. C.

I appear for the city council and accept service of this citation.

E. B. SEABROOK,
City Att'y.

20th Aug. 1875.

4 Know all men by these presents that we are held and firmly bound unto the City Council of Charleston in the full and just sum of three hundred dollars, to be paid to the said The City Council of Charleston, its certain attorney, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a term of the supreme court of the State of South Carolina, in a suit depending in said court, between Thomas C. Jenkins and the said The City Council of Charleston, a judgment was rendered against the said Thomas C. Jenkins, and the said Thomas C. Jenkins having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City Council of Charleston, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Thomas C. Jenkins shall prosecute his said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THO'S C. JENKINS. [L. S.]
(Signed) MICH'L JENKINS. [L. S.]

Sealed and delivered in presence of—the words "executor," "administrators," "first," and "December" having been first erased, and the words "successors," "second," & "October" having been first interlined—

(Signed) Jos. W. JENKINS, J'r.

Approved by—
(Signed)

N. H. SWAYNE,
Asso. Jus. Sup. C't U. S.

(Endorsed:) Filed 20 Aug., 1875. Albert M. Boozer, clerk supreme court, S. C.

5 The answer of the justices of the supreme court of the State of South Carolina to the foregoing writ.

The record and proceedings of which mention is therein made follow, in these words, to wit:

6 In the common pleas.

STATE OF SOUTH CAROLINA,
Charleston County:

THOMAS C. JENKINS, PLAINTIFF,
vs.
THE CITY COUNCIL OF CHARLESTON, DEFENDANT.

The plaintiff avers as follows:

I. He is a citizen of the State of Maryland, and is domiciled in and resides in the city of Baltimore.

II. The defendant is a municipal corporation created by the laws of South Carolina.

III. The plaintiff is the holder and real owner for valuable consideration of certain obligations of the said corporation, known as city stock, namely: Certificate No. 1535, of the issue of 1866, dated October 20th, 1869, for one thousand dollars; certificate No. 1543, of the issue of 1866, dated October 25th, 1869, for two thousand two hundred dollars; certificate No. 1637, of the issue of 1868, dated October 20th, 1869, for two hundred and seventy-two dollars; certificate No. 1752, of the issue of 1868, dated October 21st, 1870, for four hundred and eighty-five dollars; certificate No. 238, of the issue of 1854, dated October 25th, 1869, for seventeen hundred and twenty dollars; certificate No. 247, of the issue of 1854, dated October 27th, 1870, for one hundred and ninety-six dollars; certificate No. 780, of the issue of 1853, bearing date October 21st, 1870, for five hundred and six 64 100 dollars; certificate No. 782, of the issue of 1853, dated October 27th, 1870, for five hundred dollars; certificate No. 517, of the issue of July, 1867, dated October 25th, 1869, for seven hundred and sixty dollars; certificate No. 368, of the
7 issue of 1867, dated 25th October, 1869, for two hundred and sixty dollars; and the following certificates of the issue of 1857: No. 8626, period 38, dated October 21st, 1870, for five hundred dollars; No. 8638, period 44, dated October 28th, 1870, for thirty-six hundred dollars; No. 8064, period 43, dated October 26th, 1869, for fifteen hundred and fifty dollars; No. 8627, period 50, dated October 21st, 1870, for two thousand dollars; No. 8048, period 52, bearing date October 20th, 1869, for eight hundred and eighty dollars; No. 8065, period 46, bearing date October 25th, 1869, for seven hundred and eighty dollars; No. 8066, period 59, bearing date October 25th, 1869, for nine hundred and sixty dollars; No. 8628, period 63, dated October 21st, 1870, for five hundred dollars; No. 8629, period 64, dated October 21st, 1870, for one hundred dollars; No. 8049, period 66, dated October 20th, 1869, for two thousand dollars; No. 8067, period 68 dated October 25th, 1869, for thirteen hundred and thirty dollars; No. 8068, period 72, dated October 25th, 1869, for one thousand dollars, as appears by the said certificates and the books of the said corporation.

IV. The said The City Council of Charleston, in and by the said obligations or certificates of stock, promises to pay the plaintiff the several sums of money therein expressed, together with interest at the rate of six per centum per annum on such sums from the date of said certifi-

cates, payable quarterly, which interest is payable on the first day of January, April, July, and October, in each and every year.

V. The said The City Council of Charleston has not performed its contracts expressed in the said obligations or stock, and has neglected and refused to pay to the plaintiff the interest thereby agreed to be paid to him by the said corporation sums of thirty-six 78-100 dollars, ($36.78,) for interest payable on the said stock on each of the following days, viz, the first days of January, April, July, and October, 1870, and unpaid; and sums of fifty-seven 75-100 dollars for interest, payable on the said stock, on each of the following days, viz, the first days of January, April, July, and October, 1871, and the first day of January, 1872, and unpaid, making an aggregate of four hundred and thirty-five 87-100 dollars, ($435.87,) due as aforesaid, to the plaintiff by the defendant.

Wherefore the plaintiff prays judgment against the defendant
8 for the sum of four hundred and thirty-five 87-100 dollars, with interest on each sum of thirty-six 78-100 dollars and fifty-seven 75-100 dollars from the date at which each became due, and for his costs and charges.

MAGRATH & LOWNDES,
Plaintiff's Attorneys.

I acknowledge service of a copy this 22d February, 1872.
JOHN A. WAGENER,
Mayor.

Court of common pleas.

THE STATE OF SOUTH CAROLINA,
County of Charleston:

THOMAS C. JENKINS, PLAINTIFF, *against* THE CITY COUNCIL OF CHARLESTON, DEFENDANT, } Summon for money demand.—(Complaint served.)

To the City Council of Charleston, defendant in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscribers at their office, No. 34 Broad street, within twenty days after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid,
9 the plaintiff will take judgment against you for the sum of four hundred and thirty-five 87-100 dollars, with interest at the rate of seven per centum, in the said complaint, prayed and costs.

MAGRATH & LOWNDES,
Plaintiff's Attorneys.

[SEAL.] A. C. RICHMOND, *C. C. P.*
Dated Charleston, February 22d, 1872.

I accept service of the within this 22d February, 1872.
JOHN A. WAGENER, *Mayor.*

In the common pleas.

STATE OF SOUTH CAROLINA,
Charleston County:

THOMAS C. JENKINS
vs.
THE CITY COUNCIL OF CHARLESTON.

The defendant, answering the complaint of the plaintiff herein, says:

I. That the defendant believes that the matters and things contained in the first paragraph of the said complaint are true.

II. That the matters and things contained in the second paragraph of the said complaint are true.

III. That the defendant believes that the matters and things contained in the third paragraph of said plaintiff's complaint are true.

IV. That the matters and things contained in the fourth paragraph of said complaint are true.

V. That the defendant denies each and every allegation contained in the fifth paragraph of the said complaint.

VI. That as to the said several sums claimed to be due upon the said stock as interest on the several days and times as in fifth paragraph of the said complaint alleged, the said defendant says that the same were due to the defendant for taxes imposed on the said stock, and that the said sums being so due, the city treasurer deducted the same from the several payments of interest made to the plaintiff on behalf of the defendant, and paid the amount so deducted into the treasury of the city council for its use.

That the said sums so deducted for taxes were deducted pursuant to the provisions of an ordinance to raise supplies for the fiscal year ending December 31, 1870, ratified March 22, 1870, and a similar ordinance ratified March 1, 1871, which are as follows:

STATE OF SOUTH CAROLINA,
City of Charleston:

An ordinance to raise supplies for the fiscal year ending December 31, 1870.

Be it ordained by the mayor and aldermen of the city of Charleston, city council assembled:

SECTION I. That the city appraiser is hereby authorized to assess a tax of two cents upon the dollar of the value of all real and personal property in the city of Charleston for the purpose of meeting the expenses of the city government for the current fiscal year.

SEC. II. The taxes assessed under this ordinance, except such as are otherwise directed, shall be payable in three equal parts—one part on or before the tenth day of April, another part on or before the last day of June next, and the third part on or before the last day of September next.

SECTION III. The taxes assessed on city stock shall be retained by the city treasurer out of the interest thereon when the same is due and payable.

Ratified in city council this 22d day of March, in the year of our Lord one thousand eight hundred and seventy.

(Attest:) WILLIAM R. MITCHELL,
Clerk of Council.

[L. S.] GILBERT PILLSBURY, *Mayor.*

STATE OF SOUTH CAROLINA,
City of Charleston:

An ordinance to raise supplies for the fiscal year ending December 31, 1871.

Be it ordained by the mayor and aldermen of the city of Charleston, in city council assembled:

SECTION I. That the city appraiser is hereby authorized to assess a tax of two cents upon the dollar of the value of all real and personal property in the city of Charleston for the purpose of meeting the expenses of the city government for the current fiscal year.

SECTION II. The taxes assessed under this ordinance, except such as are otherwise directed, shall be payable in three equal parts—one part on or before the tenth day of April next, another part on or before
11 the last day of June next, and the third part on or before the last day of September next.

SECTION III. The taxes assessed on city stock shall be retained by the city treasurer out of the interest thereon when the same is due and payable.

Ratified in city council the 21st day of March, one thousand eight hundred and seventy-one, and in the ninety-fifth year of American Independence.

(Attest:) WILLIAM R. MITCHELL,
Clerk of Council.

[L. S.] GILBERT PILLSBURY, *Mayor.*

Wherefore the defendant demands judgment and the costs of this action.

D. T. CORBIN,
City Attorney.

Service accepted.

MAGRATH & LOWNDES,
Plaintiff's Attorneys.

APRIL 5TH, 1872.

In the common pleas, Charleston County.

THOMAS C. JENKINS
vs.
THE CITY COUNCIL OF CHARLESTON.

In this case, tried by the court without a jury, I make and file the following conclusions of law and finding of fact:

FINDING OF FACT.

I. That the plaintiff is a citizen of the State of Maryland, and domiciled and resident in the city of Baltimore.

II. That the plaintiff is owner and holder of twenty-three thousand and ninety-nine 64-100 dollars of stock of the city of Charleston, bearing interest at the rate of six per cent. per annum, payable quarterly; a part of this stock was owned by the plaintiff previous to the first of January, 1870.

12 III. The defendant on the first day of January, A. D. 1870, and on each succeeding quarter of that year, retained out of the interest due by it to the plaintiff on the said stock the sum of seventy-

three 56-100 dollars, and on the first day of January, A. D. 1871, and on each succeeding quarter to and including the first January, A. D. 1872, in like manner retained the sum of one hundred and fifteen 49-100 dollars; the said moneys being so retained as so much taxes due by the plaintiff to the defendant, being a tax at the rate of two per cent. per annum on the principal of the said stock; the said tax being imposed by virtue of the ordinance of the city council of Charleston entitled "An ordinance to raise supplies for the fiscal year ending December 31st, 1870," and a similar ordinance to raise supplies for the fiscal year ending December 31st, 1871, and that the said stock was not specifically exempted from taxation by the ordinance under which it was issued.

IV. That the aggregate of the amount retained as aforesaid is eight hundred and seventy-one 69-100 dollars.

CONCLUSION OF LAW.

I. That the city council of Charleston, as a municipal corporation, has the right under the constitution and laws of this State to tax the property of the plaintiff invested in stock issued by it; said stock not bearing specifically exemption by law from taxation, nor being exempt from taxation by the ordinance under which it was issued,

II. That the city council of Charleston has the right to collect the tax imposed on the property of the plaintiff in said stock by retaining the amount of such tax out of payments made to plaintiff on account of the interest due thereon, and plaintiff cannot recover the same.

Judgment is therefore ordered for the defendants with costs.

R. F. GRAHAM.

MARCH 21, 1873.

True copy.

[L. S.] JACOB WILLIMAN,
C. C. P.

In the common pleas, Charleston county.

13 THOMAS C. JENKINS
vs.
THE CITY COUNCIL OF CHARLESTON.

The defendant will take notice that the plaintiff appeals from the judgment rendered in this case, on the ground that the plaintiff not being a resident of the State of South Carolina, the ordinance of the city of Charleston, and the laws of the State of South Carolina authorizing the taxation of the plaintiff's stock, as set forth in the pleadings, impair the obligation of a contract, and are, therefore, in violation of the Constitution of the United States.

MAGRATH & LOWNDES,
Plaintiff's Attorney.

I accept service, and undertaking waived.

W. ALSTON PRINGLE.

MARCH 21ST, 1872.

OFFICE OF CLERK COURT, &C.

SOUTH CAROLINA,
Charleston County:

I hereby certify the foregoing to be true and correct copies of the original pleadings in this case, in which Tho's C. Jenkins is plaintiff

and the City Council of Charleston defendant, the original of which are on file and of record in this office.

Witness my hand and the seal of the court, at Charleston, this 2d April, A. D. 1873.

[SEAL.] (Signed) JACOB WILLIMAN,
C. C. P. & G. S.

(Endorsed:) Filed 4th April, 1873. (Signed) Albert M. Boozer, clerk supreme court S. C.

14 THE STATE OF SOUTH CAROLINA:

In the supreme court, April term, 1874.

T. C. JENKINS, APPELLANT,
vs.
THE CITY COUNCIL OF CHARLESTON, RESPONDENTS.

ENOCH PRATT, APPELLANT,
vs.
SAME, RESPONDENT.

G. W. BROWN, APPELLANT,
vs.
SAME, RESPONDENT.

W. C. MURRAY, APPELLANT,
vs.
SAME, RESPONDENT.

ELIZA M. BONNEAU, APPELLANT,
vs.
SAME, RESPONDENT.

Opinion.

MOSES, C. J.:

15 The general power of the city council of Charleston "to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit, and advantage of the said city, as shall appear to them expedient," is not disputed on the part of the appellants. Whatever may be the *in*tent of its authority in this regard, or how far the legislature may have devolved upon it any of its own attributes of sovereignty, so far as the taxing power is concerned within its municipal limits, the only questions raised in the cases are: 1st. Can the city of Charleston tax its own stock; and, 2nd, if it is vested with this right, can it exercise it as to such of its stock as is held by non-residents?

The argument on the general question was rested alone by the appellants on the ground that the tax imposed by the corporation impaired the obligation of the contract which existed between the holder of the stock and the city. That a contract was created, imposing obligations on both parties, binding them to its performance according to its true intent, is too plain for doubt. The States are prohibited by the 10th section of 1st article of the Constitution from passing any "law impairing the obligation of contracts," and if this right of the city council to levy the tax in question, which it could only exercise through the powers

granted by its charter, is in violation of the said prohibition, it follows as an inevitable consequence that the parties must be relieved of the tax of which they complain.

Taxation is a power not only necessary, but indispensable to government. Its exercise by the States can only be controlled by constitutional limitations. While these are observed and recognized, the wise and prudent enforcement of the power must depend on the wisdom and discretion of those to whose hands the prerogative is entrusted. The mere possession of governmental powers without adequate means of execution for the public good would be but as a "barren sceptre" for defence. There may be other limitations, as where the power is resorted to for the purpose of attaining an end which under the taxing power would not be legitimate; as, for instance, if under the guise of a tax the legislature designed to inflict a penalty. M'r Cooley, in his Constitutional Limitations, p. 129, says: "Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives."

The general power being inherent in the Government, those who deny the existence of the particular right sought to be enforced must show it as clearly forbidden by positive declaration, or arising from an implication too clear to be resisted. If the right of taxation existed as a power in the Government at the time of the contract, and so entered into it as to become one of its necessary elements and attributes, then the obligation of the contract is not impaired by the imposition of the tax, because it was a property which attached to the contract, and became one of its controlling attributes.

All property is held by individuals subject to the exercise by the State of the sovereign power which it holds over it. Where the State creates a municipal corporation, it devolves upon it a portion of that power to the extent conferred by its charter. Whatever rights it can exercise through its substitution in the place of the State within its prescribed territorial boundaries is by force of the very sovereign power which attached to the State. The duties of such a corporation are civil and political, as well as municipal. Where the right to tax has been conferred upon a body of that character, the intention to surrender it generally, or in any particular instance, must be shown by express act, or, as we have said in regard to its relinquishment by the State, by plain and unmistakable intent. In the language of Ohio Life & Trust Company vs. Dabott, 16 How., 435, referring to Billings vs. Providence Bank, and the case of the Charles River Bridge Company, "by words too plain to be mistaken."

Mr. Dillon, in his treatise on municipal corporations, sect. 589, says: "The power of taxation and the power of eminent domain, subject to both of which all private property is held, although they both originate in political necessity, are in their nature materially different. For taxes paid, or money exacted under the taxing power, no direct specific compensation is made; but where property is taken under the right of eminent domain, this can be done only to the limited extent required by the particular object or enterprise in favor of which it is exercised, and then only on the condition of making to the owner direct and full compensation in money for the particular and unequal sacrifice which he would otherwise be obliged to make for the public benefit." The power of taxation is at least as high a prerogative

of government as that of eminent domain; for while taxation does take private property for public use, it acts in this particular instance without the correlative obligation of compensation, for the reason that in the one case the property of an individual is taken for the public good and made subservient to it, without including other property similarly situated, while in the other, all property of the same kind is held subject to the imposition of a tax, and must contribute to the fund which it is proposed to raise.

In West River Bridge Co. vs. Dix, 6. How., 507, while it was admitted that the charter was a contract between the State and the company, it was held "that the right of eminent domain did not interfere with the inviolability of contracts; that all contracts are made subject to that right, and the contract in question was not violated by its exercise." In the opinion of the court, it is said: "But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher
19 authority of the laws of nature, of nations, or of the community to which the parties belong. They are always presumed, and must be presumed to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulations, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur. Such a condition is the right of eminent domain." At page 531, it is said: "No State, it is declared, shall pass a law impairing the obligation of contracts. Yet with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its owns existence and of protecting and promoting the interests and welfare of the community at large;" and on page 532: "This power denominated the eminent domain of the State is, as its name imports, paramount to all private rights vested under the government, and these last are by necessary implication held in subordination to this power, and must yield in every instance to its proper exercise."

It is impossible not to perceive that the same principle which ran through and controlled the judgment in that case must apply where it is sought to resist the payment of a tax, because its imposition interfered with the inviolability of a contract. Taxation is in every regard as much an inherent power of government as is that of eminent domain.

Mr Justice Woodbury, in a separate opinion in the same case,
20 p. 539, says: "I take the liberty to say, then, as to the cardinal principles involved in this case, that in my opinion all the property in a State is derived from, or protected by, its government, and hence is held subject to its wants in taxation and to certain important public uses both in war and peace." At page 542, he says: "And because on a like principle taxes may be imposed on such property, as well as all other property, though coming by grant from the State, and may be done without violation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it. This is well settled."

In Gilman vs. The City of Sheboygan, 2 Black, 513, Mr Justice Swayne said: "The act of 1854 authorized the borrowing of money, the issuing of bonds, and the levying of a tax upon all the property in the city for the purposes specified. The imposition, modification, and removal of taxes, and the exemption of property from such burdens, is an

ordinary exercise of the power of State sovereignty. There is no pledge, expressed or implied, that this power should not thereafter be exercised."

In Providence Bank vs. Billings, 4 Pet., 562, Chief-Justice Marshall, delivering the opinion of the court, said: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individuals may be, it is still in the nature of that right that it must bear a portion of the public burthens, and that portion
21 must be determined by the legisature."

In Brewster vs. Hough, 10 N. H., 143, "the power of taxation" is said "to be essentially a power of sovereignty or eminent domain."

M'r Justice McLean, in delivering the opinion of the court in State Bank of Ohio vs. Knoop, 16 How., said: "The power of taxation has been compared to that of eminent domain, and it is said, as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act."

Is there anything in the contract itself which by necessary implication can be construed into a stipulation or covenant for exemption of taxation by the city? The contract remains undisturbed, unchanged. The obligation on the city to pay the annual interest is not denied. The performance of all it imposes is admitted, and the agreement remains as perfect in form and as binding in effect as when it was executed. But it is said if the city assesses a tax on the value of the stock, the holder does not receive the amount of the interest agreed to be paid. It is diminished to the extent of the tax. This result, however, is not effected by any change of the contract or refusal of the council to recognize it as imposing on them a liability to pay the accruing interest, but the stock becomes less valuable to the holder, because the authority repre-
22 senting to a certain extent the sovereignty of the State interposes and lays a charge upon it for public purposes through a tax. The same consequences follows from the imposition of taxes by the city on all other property admitted to be liable to it. The tax on real property and on that of personal having a tangible form, to the extent of its demand, re-opens the value of such property. The tax from income, no matter from whatever source derived, necessarily reduces its amount. It is difficult to perceive why the proposition now insisted on by the appellants may not as well apply to the whole principle on which the right to tax is founded.

In the case of Providence Bank vs Billings, already referred to, Chief-Justice Marshall uses this language: "If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has in many, perhaps

in all, the States been granted by Government since the adoption of the Constitution. This grant is a contract, the object of which is
23 that the profits issuing from it shall enure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all, and the proposition appears so extravagant that it is difficult to admit any resemblance in the cases. And yet if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant is inconsistent with it, and is, therefore, impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal, and therefore its truth cannot be admitted in these broad terms in any case. We must look for the exemption in the language of the instrument, and if we do not find it there, it would be going very far to insert it by construction."

M'r Blackwell, in his work on Tax Titles, p. 6, says: "If the tax is laid to raise a revenue for the expenses of the State, it should be laid equally on all the property in the State." A resident of Charleston might convert his entire property into city stock, and according to the proposition contended for on the part of the appellant, while enjoying all the protection which the corporation affords to him, and all others in its limits, may contribute nothing to its support, not even to the very taxes through which the interest on his own stock is to be raised. The holders
24 of all other property are to be assessed, while he, reaping all the advantages, bears none of the burthens of a property-holder.

Nor can the fact that the right may be abused operate to defeat its exercise. The same argument would apply to destroy all the functions of government. As was said by Ch. Justice Marshal, in his opinion from which we have already cited: "However absolute the right of an individual may be, it is still in the nature of that right that it must bear a proportion of the public burthens, and that portion must be determined by the legislature. The vital power may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State government. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express control against unjust and excessive taxation, as well as against unwise legislation generally."

Regarding, then, city stock as personal property liable to the tax imposed, it remains to be considered whether such stock held by non-residents can be taxed by the said corporation. The right is resisted entirely on the ground that personal property has no situs in itself, but follows the domicil of its owner. But this is not true as a general and unvarying rule; for its application will be found to be trammelled and encumbered with so many exceptions that the principle upon which its very existence depends is not only affected but destroyed.
25 Personal property of a visible and tangible kind is taxed where it is found, without regard to the residence of the owner, and his domicil in one State will not so affect the possession of property beyond it as to subject it to taxation by the State in which he resides. If the rule contended for is without restriction, then the right to tax would be regulated, not by the actual situs of such personal property, but by the domicil of the owner.

M'r Story, in his Conflict of Laws, sect. 380, referring to the princi-

DISCREPANCY IN PAGINATION

Or

PAGES MISSING

And

CANNOT BE FOUND

DISCREPANCY IN PAGINATION

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it could be deducted from the interest payable to the holder. A non-resident holder of such stock could be reached for the tax in no other way.

All the cases involve the same questions, and the motion in each is dismissed.

Wright, A. J., concurs; Willard, A. J., dissents, and filed dissenting opinion, which follows.

31 THE STATE OF SOUTH CAROLINA,
In the Supreme Court:

I certify that the foregoing 17 written pages comprise a true copy of the original opinion of the supreme court in the case of S. C. Jenkins, appellant, & others, appellants, vs. City Council of Charleston, respondent, filed in this office October 6th, 1874.

Witness my hand and the seal of the said court, at Columbia, this 6th day of November, 1874.

[SEAL.] ALBERT M. BOOZER,
Clerk of Supreme Court of South Carolina.

(Indorsed:) The State of South Carolina. Supreme Court. April term, 1874. T. C. Jenkins, appellant, vs. City Council of Charleston, respondent; Enoch Pratt, appellant, vs. Same, respondent; G. W. Brown, appellent, vs. Same, respondent; W. C. Murray, appellant, vs. Same, respondent; Eliza M. Bonneau, appellant, vs. Same, respondent. Opinion Moses, C. J. Wright, A. J., concurs. Willard, A. J., filed dissenting opinion. Certified copy.

32 THE STATE OF SOUTH CAROLINA:

In the supreme court. April term, 1874.

T. C. JENKINS, APPELLANT,
vs.
CITY COUNCIL OF CHARLESTON, RESPONDENT.

OPINION.

WILLARD, A. J.:

In my judgment, it is not necessary to consider the question whether the attempt by the city government to impose the tax in question was an act tending to violate the obligation of a contract. If the constitution of the State, or the statutes conferring the taxing power upon the defendants, had that effect, the question would properly arise. I am satisfied that neither the constitution nor the statutes conferring municipal power on the city government are to be construed as supporting the exercise of the taxing power called in question in the present case.

The plaintiff is not a resident or inhabitant of the city of Charleston, nor is he liable to taxation there for municipal purposes as the owner or holder of either real or personal property within that city. There is no special authority conferred either by the constitution or the statutes to reach the imposition of a tax in such a case, nor can it be im-

33 plied from the general authority to levy and collect taxes.

In order to impose a tax, there must be a person liable to taxation, either directly, as in the case of a poll-tax, or by reason of some subject of taxation, either real or personal property within the taxing jurisdiction. The grant of authority to the city government to tax is

limited by the nature of taxation and the rules of law governing its exercise; and where the statute is silent on the subject, the courts are competent to apply the limitations thus imposed, by the recognized principles applicable to the case.

The only ground on which the tax before us can be supported is that the plaintiff was the owner of city stock. In substance and legal effect the city stock is merely the evidence of debt due from the city to the holder of its stock. It bears no analogy to stock in an incorporated company, as in the latter case the stockholder is part owner of the capital and earning of the company, while the holder of the city stock has no right beyond that of claiming a sum certain and interest at an agreed rate.

The question then resolves itself into this: whether the city can impose upon the non-resident holder of its obligation any part of the duty of supporting the municipal government. It is clearly against reason and justice. It is a case of a debtor claiming support from his creditor while acquiring the means of paying his debt.

A principle so clearly wrong needs no elucidation, nor need it be encumbered with laborious considerations of the legal idea of the
34 situs of property. It is simply an abuse of the taxing power, recognized at once by the application of those rules of right dealing that are open as well to the common sense of the community at large as to those fettered by legal learning.

THE STATE OF SOUTH CAROLINA:

In the supreme court.

I certify that the foregoing is a true copy of the original opinion of Associate Justice Willard in the case of Jenkins & others vs. City Council of Charleston. Filed October 6th, 1874.

Witness my hand and the seal of court, at Columbia, this July 2nd, 1875.

[SEAL] ALBERT M. BOOZER,
Clerk.

(Indorsed:) Supreme court of S. C. April term, 1874. T. C. Jenkins & others, appellants, vs. City Council of Charleston, respondent. Dissenting opinion of Willard, A. J. Certified copy.

35 THE STATE OF SOUTH CAROLINA:

Supreme court.

THOMAS C. JENKINS, APPELLANT,
vs.
THE CITY COUNCIL OF CHARLESTON, RESPONDENT.

} Appeal from the first circuit, Charleston County.

Docketed April term, 1874.
, for appellant.
, for respondent.

Judgment.

Motion dismissed.

Filed October 6th, 1874.

Witness my hand and the seal of the court, at Columbia, this 6th day of November, one thousand eight hundred and seventy-four.

[SEAL.] (Signed) ALBERT M. BOOZER,
Clerk of Supreme Court.

(Indorsed:) The State of South Carolina. Supreme court. Thomas C. Jenkins, appellant, vs. City Council of Charleston, respondent. Appeal from Charleston County. Judgment certified to clerk of circuit court for Charleston County.

36 THE STATE OF SOUTH CAROLINA:

Supreme court.

I, Albert M. Boozer, clerk of the supreme court of the State of South Carolina, hereby certify that the foregoing and annexed 50 pages contain the original writ, citation, and service thereof, with copy of writ of error bond filed and approved therein, together with a true and complete transcript of the record, process and proceedings, and final judgment in a certain cause lately pending in said court wherein Thomas C. Jenkins was plaintiff and The City Council of Charleston was defendant, as the same remains of record in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Columbia, in said State of South Carolina, this 1st day of September, A. D. 1875, and in the one hundredth year of the Independence of the United States of America.

[SEAL.] ALBERT M. BOOZER,
Clerk of Supreme Court of State of South Carolina.

(Indorsement on cover:) No. 237. Thomas C. Jenkins, plaintiff in error, vs. The City Council of Charleston. S. Carolina sup. court. Filed 16th October, 1875.

SUPREME COURT

OF THE UNITED STATES.

THOMAS C. JENKINS,

PLAINTIFF IN ERROR.

vs.

The CITY COUNCIL of CHARLESTON,

DEFENDANT IN ERROR.

BRIEF OF A. G. MAGRATH,

FOR PLAINTIFF IN ERROR.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL, PRINTERS,
NOS. 3 BROAD & 109 EAST BAY STREETS.
1877.

SUPREME COURT OF THE UNITED STATES.

THOMAS C. JENKINS, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF CHARLESTON, DEFENDANT IN ERROR.

BRIEF OF A. G. MAGRATH, FOR PLAINTIFF IN ERROR.

Can the city of Charleston levy a tax upon stock of the city owned by a non-resident, a citizen of another State?

1. If the *situs* of the stock of the non-resident is not in the city of Charleston—not within the chartered limits of the city, and therefore not within its jurisdiction—not being subject to its control, it cannot be taxed. 1

2. If the *situs* of the stock is within the chartered limits of the city, the imposition of the tax, levied by the authority of the State, impairs the obligation of the contract; the tax is unconstitutional, and cannot be levied.

AS TO THE FIRST PROPOSITION.

The stock is personalty. According to the general rule, it follows the person of the owner. His domicil fixes its *situs*. Where personalty has a visible, tangible existence, that determines its *situs*, without regard to the domicil of the owner. 2

Bonds, mortgages, and debts generally, have no *situs*, independent of the domicil of the owner; and certainly have none where the instrument which constitutes the evidence of the debt is not separated from the possession of the owner. The rule which fixes the *situs* of a bond is the same, although the bond is secured by mortgage of land in a place different from the domicil of the owner of the bond. The mortgage 3

attaches itself to the bond, and the *situs* of the bond fixes the *situs* of the security given for the payment of the bond.

In this case the certificate of the stock of the city of Charleston, which is the same as a bond, is "the evidence of the debt;" it is "not separated from the possession of the owner," and therefore calls for the application of the rule that it can have no *situs* independent of the domicil of the owner.

The general rule applicable to "evidences of debt," "not separated from the possession of the owner," applies to this
4 case, and the *situs* of the debt is domicil of the owner. The tax cannot be levied. The property is beyond the jurisdiction, and so is the owner.

"The stock * * is the evidence of debt created by the exercise of this power"—(to borrow money.)

Weston vs. City Council of Charleston, 2 Pet. R., 448.

"Debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense: they are obligations of the debtors, and only possess value in the hands of creditors."

5 *R. R. Co. vs. Pennsylvania, 15 Wall. R., 300*

"To call debts property of the debtors, is simply to misuse terms." *Id.*

"Their debts (referring to debts of corporations) can have no locality separate from the parties to whom they are due. *Id.*

"The bonds * * are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State."—*Id.*

"Subjects over which the sovereign power of a State ex-
6 tends are objects of taxation."

McCulloch vs. State of Maryland, 4 Wh. R. 316

"The power of taxation * * is limited to persons, property or business within its jurisdiction. Personal property, *in the absence of any law to the contrary*, follows the person of the owner and has *its situs* at his domicil. But for the purposes of taxation, it may be separated from him and he may be taxed on its account at the place where it is *actually located*. If the State has actual jurisdiction of the person of the owner, it operates directly in him. If he is absent and it

has jurisdiction of his property, it operates upon him, through his property."

Tappan vs. Merchants National Bank, 19 Wall R. 490.

See the matter of *Kellinger, Collector, 9 Paige R., 61.*

In the case of this stock there is no law which gives to it a *situs* different from the domicil of the owner, and locates it in the city of Charleston, so to be subject to taxation.

In *Jenkins vs. City of Charleston, 5 S. C. R. (N. S.) 393*, the Supreme Court of the State decided that the *situs* of stock of the city is within the City of Charleston; that the City Council can lawfully tax its own stock, whether owned by residents or non-residents; and that such tax does not impair the obligation of the contract.

The decision in that case was given by Ch. J. Moses, with Wright, Associate Justice. The present Chief Justice Willard strongly dissenting.

The decision in that case was placed upon these grounds:

1. That the *situs* of this stock is in the city of Charleston; and the authority for that proposition is the *Rail Road vs. Pennsylvania, 15 Wall, R. 300.*

2. That the stock "was issued by the city of Charleston, payable and transferable there, and there alone can certificates in case of loss be obtained."

3. That a municipal corporation can "only be sued in a court which has jurisdiction over territory within which its own limits are prescribed."

4. That the case of *Tappan vs. Merchants Bank of Chicago, 19 Wall, R. 490*, is also authority for the decision so made.

1. Does the case in *15 Wall, R. 360*, sustain the decision so made?

Referring to a class of cases where personal property, having a visible and tangible existence, has its *situs* different from the domicil of the owner, this Court said "the same thing is true of public securities, consisting of State bonds and bonds of municipal bodies, and circulating notes of

banking institutions; the former by general usage have acquired the character of and are treated as property in the place where *they are found*, though removed from the domicil of the owner."

In that case the question of the taxation of State bonds, or
11 bonds of municipal bodies, was not involved.

The language of the Court therefore was not its judgment in a case before it. It may therefore be permitted that its exact meaning should be understood.

The construction given to the term "found," is different from the meaning attached to the same term when used in connection with a question of jurisdiction.

In the case of The Lake Superior and Mississippi Railroad Company *vs.* United States, 93 U. S. Rep., 442, this Court said: "The forms of legislative expressions thus adopted
12 and coming down from a period when they had greater practical significance than they now have, bring with them an established sense, which renders them free from all uncertainty and doubt." Much greater exactness in regard to the meaning of a word is to be found in the decisions of a Court: and it is not to be supposed that a word used in an Act of Congress can have a different meaning from that given to it in the decision of a Court.

Defendant may be arrested in a district of which he is an inhabitant, or in which he may be "found." There the loca-
13 tion of the person creates the jurisdiction. If this term in the case of the Pennsylvania Railroad has the same meaning in regard to personalty, to what shall it be applied? Is it to the debt itself, or the certificate of stock, which is only the evidence of the debt? If the latter, will it be "found" wherever it may be? If the former, will it be "found" only where the municipal body, the debtor may be?

If in the opinion of this Court in the case referred to, the *situs* of the bond of a municipal body is not said to be the domicil of the owner; not a word in that opinion fixes the
14 *situs* in the municipal body itself by which that bond was issued.

The distinction which has been suggested between debts, the evidences of which are bonds of a State, or a municipal

body; and the bonds of a private corporation; was founded upon reasons which no longer exist; and are not recognized in the courts where formerly they were upheld.

Judge Story, in his Commentaries on the Conflict of Laws, accepts the doctrine of Lord Mansfield in *Robinson v. Bland*, *2 Burr., p. 1079*, in which he refers to the difference between local and personal statutes. Statutes which are local regard the things to which they relate as really upon the spot in England. "So stock jobbing contracts and the statutes thereupon have reference to our local funds," says Lord Mansfield. And again, "where the subject matter relates locally to England, the law of England must govern and must have been intended to govern." * * * "The local nature of the things requires them to be carried into execution, according to the law here." * * * "In every disposition or contract, where the subject matter relates locally to England, the law of England must govern and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stock, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here."

If the reason so given were still recognized and applied to all cases, then the law of the place in which according to the terms of the contract it is to be performed, will not only govern the construction and enforce the performance of it; but according to the argument decide the *situs* of the debt of which the contract is only the evidence. That can not now be said. The changes which have taken place in these evidences of debt; the introduction of them into all the channels of business; the unlimited negotiability of them; the mobility which characterizes their constant and free transfer from hand to hand; are in opposition to the idea of a fixed locality other than the domicil of the owner; in which only they are "found;" and to which place a reference is supposed to be intended regulating the control of them for taxation and all other purposes.

Mr. Burge says: following the same lead, "Property in the public funds, or stocks, shares in companies, joint stock,

&c., is a species of personal property, which as it is created, so it is regulated by the law of the county in which it exists."

Is this so? Does the place where a contract is made, or where it is to be executed; or where the courts of that place must be applied to for the enforcement of it; fix that place as its *situs*, in a question of succession or taxation?

A note payable on its face at a certain bank in Charleston
19 has locality connected with performance. But that does not fix there its *situs*. The bond of a railroad company, required to be registered at its treasury in Charleston, can only be transferred there; but like the note, its *situs* is in the domicil of the owner. The distinction between that note or railroad bond, and the stock or bond of the city of Charleston, must be founded upon some other reason than that of the *place* where it was made or where it is to be enforced. If in the case of a State bond, there are any reasons for fixing its *situs* in the State in which it is issued, such reasons
20 do not apply to the bond of a municipal body. A State can not be sued. If in a matter of contract relief is sought, it must be by petition. No coercive process in or out of its limits can reach it.

None of these considerations apply to the bond of a municipal body. It can be sued as any other corporation. Its effects may be attached as may those of a natural person. It is said to represent the sovereign power of a State: but it has not, nor can the State give it immunity from suits.

The bond of a municipal body is in no wise different from
21 its stock. Each is the evidence of a debt. Each furnishes a cause of action. And so wholly is the case of a municipal debt without any control of the city or town by which it was made, that the municipal body will be forced to levy a tax for the payment of it when due. The Topeka case established the rule; and the rule was adhered to and applied by the Chief Justice of this Court in the case of the city of Charleston, upon the application of Charles Parsons.

The distinction between the locality of a contract which fixes its *situs*, and the place according to the law of which it is to
22 be enforced, is clearly presented in the case of a mortgage to secure a bond. The mortgage is one of those cases by

which Lord Mansfield illustrates the locality of a contract. It is not so now. Yet the mortgage is a contract, it relates to land, its creation and its enforcement are all regulated by positive law of the place where the land is. What in the bond of a municipal body can give to it so positive an idea of locality as does the mortgage? But the rule of Lord Mansfield does not now prevail; and the very case by which he illustrates it, is now not affected by it.

But again, the law of the place of performance is that law 23
which was in force when the contract was made. No law, when this stock was issued, was supposed to exist, or did exist, to determine the *situs* of the stock, and so assert a right to tax it. The assertion of the right is inconsistent with the uses of the stock or bond; for such a power would tend to so unsettle the value that it could not be marketable. If the power to tax exists, there is no limit to it; and if the possibility of the abuse of it is not a reason to prevent the delegation of it; the possibility of its abuse is a sufficient reason for not presuming it by any forced implication to have been 24
granted, when nothing in the nature of the contract calls for that presumption.

These considerations show that the reasons which once fixed the *situs* of a municipal bond in the place whence it was issued, and not at the domicil; cannot be now recognized. They and the explanation of them, as stated by Lord Mansfield, have now been altogether rejected.

The English funds, says Bayley, B., in the location of them, might originally be considered as being real property, and descendible to the heir, but which, very soon afterwards, was 25
considered to be personal property, and not descendible to the heir, but to go as personal property would go.

Bayley, B., *in re. Ervin, 1 Crompton & Jervis, 154.*

The case was argued by Lord Brougham, who contended that the property was in the nature of real property; consisting, as it did, of American, Austrian, French, and Russian funds; and held that it was local, and transferable only in the countries in which these funds were. The Attorney-General contended that this was personal property, and to be distributed according to the *lex domicilii.* 26

Bayley, B., said: "You are not to look at the place where the thing is payable or transferable; but when once you have ascertained that it is personal estate, then you are to ascertain what are the rules of law with regard to personal estate; that personal estate being at the time not locally in this Kingdom, but being at the time locally situated abroad."

"It is clear from the authority of *Bruce vs. Bruce, 2 B. & P., 229 (n.)*, and the case of *Summerville vs. Summerville*, that the rule is, that personal property follows the person, and it is
27 not in any respect to be regulated by the *situs*; and if in any instance the *situs* has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitæ* resorted to, it has been improperly done. Wherever the domicil of the proprietor is, there the property is to be considered as situate."

Sommerville vs. Sommerville is reported in *5 Ves., 750.*

The principal question in that case concerned the law of domicil; but in considering it the Master of the Rolls adverted to the question now before this Court, in the following lan-
28 guage: "The succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or death, or the situation of the property at that time. That is the clear result of the opinion of the House of Lords in all the cases I have alluded to, which have occurred within the last few years." * * And again, "it is hardly possible to contend that money in the funds, however large, shall preponderate against his residence in the country and his family
29 seat."

Bruce vs. Bruce, 2 Bos. and Pul., 229, (note,) was also a question of domicil. In that case Lord Thurlow said: "Personal property follows the person of the owner, and in case of his decease, must go according to the law of the country where he had his domicil; for the actual *situs* of the goods has no influence." In *Arnold vs. Arnold, 2 M. and C., 256,* the rule laid down in *The Attorney-General vs. Jackson, 8 Bligh, 15 N. S.*, was adopted.

The case of *Thomson vs. The Advocate-General, 12 Cl. and*

Fin. 1, finally settled the question in fixing the *situs* of per- 30
sonal property in the domicil of the owner. In that case Lord Campbell said: "The truth is, my Lords, that the doctrine of domicil has sprung up in this country very recently; and that neither the Legislature nor the Judges, until within a few years, thought much of it; but it is a very convenient doctrine: it is now well understood, and solves the difficulty with which this case was surrounded." The question was of legacy duty, and it was ruled that, "domicil with respect to legacy duty is hereafter to be the rule."

The decision in the House of Lords in this case, (*Thomson* 31
vs. The Advocate-General,) overruled the earlier cases with which it was in conflict, and the principle was "finally settled that the law of the domicil of the owner of personal property determines its liability to legacy duty." (*Jackson vs. Forbes, 2 Crompton & Jervis 381, note, p. 405.*)

The case of Jackson vs. Forbes, now referred to, is specially to be considered, because, although the testator was domiciled in India, his property had been by the executors brought to England, and when the case was considered, was invested in 3 per cent. consols. The Exchequer Court never- 32
theless held that legacy duties were not changeable.

The *Attorney-General vs. Napier, 6 Exch., 217*, was the converse of the rule laid down in the case last cited, and it was held, that if the testator was domiciled in England, legacy duty was payable on his personal estate, though not situate in England."

The exact point to which these cases go is this: that property in the English Funds was at one time assimilated as regards the *situs* to realty, and went to the heir; but this rule has been exploded: and it is now held as personalty. 33
That personalty of all kinds, no matter where situated, follows the domicil of the owner, and is held to be property where the owner has his domicil.

It is not necessary for us to go as far as the House of Lords went in *Thompson vs. The Advocate General*, and qualify the rule laid down in *R. R. Co. vs. Pennsylvania, 15 Wall, R. 300*, and *Tappan vs. The Merchants National Bank, 19 Wall, R. 490*, in both of which "visible, tangible property"

is declared to have its *situs* in the place where it is "found,"
34 though that is not the domicil of the owner. The cases cited show, that in England, where at one time a supposed similitude of the public funds to real estate fixed the *situs* of such property, that the rule is not now recognized; that public securities are not distinguished from other personal property; and follow the general rule that the *situs* of such property is the domicil of the owner.

In concluding what is proper to be said on this question, there is one view of the case which should not be overlooked. It is not only the right of the creditor holding this stock of
35 the city of Charleston, to receive that which is due to him; but it is his right, moreover, if that which is due to him is not paid, to have the process of the Court to compel the City Council of Charleston to levy a tax for the purpose of paying him the debt which is due to him. In the case of *The City of Topeka, 20 Wall, R. 660*, this Court held that the power to contract a debt by the issue of municipal bonds, or what is the same thing, municipal stock, carried with it, by necessary implication, the power to provide for the payment or redemption thereof, by the levy and collection of a tax, unless the
36 contrary expressly appeared. In the case of *Ex parte* Charles Parsons, before the Chief Justice of this Court, an application was made and granted for a mandamus to compel the City Council to levy a tax to provide for the payment of over due city stock. Could Charles Parsons, in that case, have the right to compel the City Council to levy a tax to pay him the face of his certificate, and the City Council have at the same time a right to tax that money which had been raised by a tax to pay him his debt? Would not that exercise of the taxing power be productive of a strange confusion, if, at
37 one time it was exercised in raising money to pay a debt; and then by taxing the money so raised, in part at least, restore it back to the city of Charleston, the debtor?

2. The next proposition upon which the opinion of the Supreme Court of the State rests is, that the stock was issued by the city of Charleston; payable and transferable there; and there alone can certificates in case of loss be obtained. The conclusion is therefore adopted, that the city of Charleston is the *situs* of the stock, and if so, it is taxable there.

That the place where the stock was issued, or is to be paid, or where a certificate, which is the evidence of the debt, can be had, if the original is lost; cannot, for any or all of these, 38
be considered as fixing the *situs* of the debt in such place, and not in the domicil of the owner, has been sufficiently considered. The only part of this proposition of the Supreme Court of the State to which a word need be added, is that which relates to the quality of transferability. Does the regulation for the mode of transfer, that mode being at the treasury office in Charleston, fix at that place the *situs* of the stock?

What is understood to be the meaning of this qualification of the right to transfer? 39

In the *Bank of Attica vs. the Manufacturers' and Traders' Bank, 20 N. Y. Rep., 501*, the transfer of stock, to be valid, had to be made on the books of the bank, and signed by the shareholder, or his or her attorney, duly authorized in writing; and every transfer must be made subject to the conditions set forth in the articles of association. It appeared that the seller of the shares was indebted to the bank, and when the purchaser demanded the transfer the bank refused to make the transfer on its books. The purchaser brought his action *against* the bank for the value of the shares, and the 40
Court held he could recover.

The case of the *Union Bank of Georgetown vs. Laird, 2 Wheat., 390*, does not sustain the decision in the case just quoted. Perhaps in the former case regard was had to the ground, that the certificate given to the seller did not notify the purchaser of the prior right of the bank to hold the stock for the debt of the seller.

But in the case in *2 Wheaton R., 390*, the certificate did not give notice to the purchaser of the lien of the bank.

Brent vs. Bank of Washington, 10 Pet. R., 596, is to the 41
same point, and so are many cases.

But these and other cases do not decide that which is claimed by the Supreme Court; they do not decide that as between the purchaser and seller the stock is not transferred; but only that the purchaser takes nothing more than what the seller had.

In a court of high authority in the State of South Caro-

lina we have, however, its construction of the meaning and effect of such regulations of the mode of transfer.

In the case of *The State Bank v. Cox & Co., 11 Rich. Eq.*
42 *R., 344*, Chancellor Dargan said: "In the argument at the trial there was much discussion on the question whether certificates of bank stock were transferable by delivery. Much can be said in favor of such a rule founded upon the convenience and customs of commerce. I incline to think that the preponderance of authority is in favor of the affirmative of the proposition. In this particular certificate of stock (as all others that are issued by the bank) there is a condition expressed that it was only transferable at the bank. * * * But I apprehend that regulations of this kind, even when they
43 are introduced into the bank charters, are intended for the convenience, protection and security of the banks themselves. It is to give the bank notice and information as to who are the stockholders." And the Appeal Court sustained the decree. In no case can the reason for the rule be otherwise stated, than that it is for the protection of the bank. To carry it farther, beyond the rule which applies to personal property, and make it the basis of the proposition, that because a mode and place of transfer have been designated, the thing itself is absorbed in the mode, and the place of
44 transfer or of payment fixes the *situs* of the debt, would be to beg the conclusion, not to demonstrate it.

In a still later case the insufficiency of the evidence of a transfer proposed to be proved by the transfer book at the treasury was fully declared by the Court. In *Fraser & Dill v. City Council, April 2, 1876, (mss.)* the Supreme Court held that in proving a transfer, the original certificate must be produced and cancelled and the new certificate issued. That the transfer book only contained memoranda furnished by the certificate; and the entries in the transfer book there-
45 fore were not more than copies.

3. The third proposition, that a municipal corporation can only be sued in a court which has jurisdiction over territory within which its own limits are prescribed, affords, if possible, even less support to the conclusion of the Supreme Court of this State than that which has just been noticed. Is it

meant by this to say that if one cannot sue his debtor outside of the limits of a city or State, that this fixes the *situs* of the debt in the home of the debtor, and not in the domicil of the creditor? So to say would be simply absurd, yet so to say is to claim for the proposition that which is necessary for its support. 46

4. But the opinion of the Supreme Court of the State assumes for its conclusion the authority of this Court in the case of *Tappan v. Merchants' National Bank, 19 Wall. R., 491*. The ruling in that case cannot be properly so applied. In that case the taxability of the shares of the National Bank was declared in the National Banking Act to be in the place where the bank was located. The liability of the stock to be taxed because its *situs* was fixed by law, made it subject to the taxing power of the State. The Act of Congress the 13th 47
June, 1867, declared that stockholders shall be assessed and taxed in the county, town, or district, where such bank is located, *and not elsewhere;* whether such stockholder resides in such county, town or district, or not.

Each stockholder, therefore, took his stock with an ascertained liability of it to be taxed. In the language of the Chief Justice, the shares of stock were personal pro erty, in one sense intangible and incorporeal, *but the law which created them* separated them from the person of the owner for the purpose of taxation. And this, as the Court said, was 48
"a law of the property," "every owner takes the property subject to this power of taxation, under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation, on account of his ownership." To apply this case to another in which there is no such law; where the owner of stock never was notified that he took it subject to the power of taxation; where the the non-resident never did, in becoming owner, voluntarily submit himself to the jurisdiction of the City Council of 49
Charleston for all the purposes of taxation; is simply to sustain one case by another in which there is no principle in common between them.

If the *situs* of the bank stock in the case in *19 Wallace*, was

in the town of South Chicago, it did not need the Act of Congress to make it taxable; for that *situs* would make it subject to the taxing power of the State of Illinois. If the Act of Congress was necessary to give it that *situs*, it must be considered that without that Act its *situs* would not have been so
50 recognized. It was not a general principle by which that *situs* was determined, but a special law for this special property. And all that can be said to have been ruled in that case is, that Congress, in creating a stock, had the power to say what should be its *situs*; and that whoever took it, took it conceding that to be its *situs*; and was bound thenceforth by his admission.

Then upon this branch of the question nothing remains but to consider how far the Supreme Court of the State is to be sustained in its declaration that the holder of the stock took
51 it subject to the implied power of the City Council to tax it. Of course it is plain that this proposition assumes that to be implied which, in the case in *19 Wall. R., 491*, Congres positively expressed. If the right to tax is claimed, the *situs* must be assumed to be where the tax is levied. If the *situs* was fixed by law, it became subject to be taxed, unless it was specially exempted. The test, therefore, of the case upon this point is, where was and is the *situs* of this stock? The law which created this stock did not fix that *situs* in the city of Charleston. If there was no special law, was there any
52 general principle of law which fixed the *situs* in the city of Charleston? The theory in the earlier cases which led to such conclusion is no longer recognized. The later cases fix the *situs* of this stock in the domicil of the owner. And being so, of course it could not be taxed by the debtor, the city of Charleston.

If no special law fixes the *situs* of this stock for the purposes of taxation: if no general law in such cases, because of the nature of the stock fixes its *situs* in the City of Charleston; how can there be an implied right to tax, in the absence of any special or general law, unless the taxing power in this
53 case is freed from the limitations which in all other cases control it?

AS TO THE SECOND PROPOSITION.

Does the imposition of this tax bring the case within the inhibition of the Constitution of the United States, against any State impairing the obligation of a contract?

In fact the obligation of the contract is impaired, because the contract is to pay a certain sum; and the tax lessens the contract by an enforced reduction to the amount of the tax. 54

But it is said it is not a case within the inhibition, because the exercise of the taxing power is lawful; and the obligation was, and is, subject to the exercise of that power.

Concede the right to tax to be a power essential to State Government. To a certain extent it cannot be interfered with, but it is not wholly absolute. It cannot be exercised wherever it interferes with the power given to the United States.

Western vs. City Council, 7 Pet. R., 449.
McCulloch vs. Maryland, 4 Wh. R., 316. 55
Osborn vs. Bank U. S., 9 Wh. R., 738.

Can it be exercised to effect that which the State has not power to do?

The 10th amendment is: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively or to the people."

"No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Art. 1, Sec. 10, Const. U. S. 56

"Any law" "impairing the obligation of contracts," is that which "no State shall pass."

"If (says Ch. J. Moses) the right of taxation existed as a power in the Government at the time of the contract, and so entered into it as to become one of its necessary elements and attributes, then the obligation of the contract is not impaired by the imposition of the tax." (Rec. p. 9.)

This, therefore, assumes that the denial of power to impair the obligation of the contract is qualified by the power of the State to tax. And that the law of this case is that which it 57 would be, if to the inhibition there was attached the proviso,

that it shall not be intended to affect the power of the State to tax.

In this case, and at this point, this Court must proceed entirely independently of the judgment of the Supreme Court of the State. The language of this Court in the *Jefferson Branch Bank vs. Skelly, 1 Black R., 436*, is strictly applicable here. "Of what use would be the appellate power to the litigant who feels himself aggrieved by some particu-
58 lar State legislation, if this Court could not decide independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State?"

What is the phraseology of this Certificate of Stock? "Be it known that there is due from the City Council of Charleston unto A B, or his assigns, the sum of one thousand
59 dollars, bearing interest at the rate of six per cent. per annum, from the first day of July, A. D. 1871, payable quarterly; being stock created in pursuance of an ordinance of the City Council of Charleston, ratified;" it then gives the date of the ratification and the title of the ordinance, and proceeds: "Redeemable on the 4th March, 1866, which debt is recorded in and transferable only at the office of the City Treasurer, by appearance in person, or by attorney, according to the rules and form instituted for that purpose." This is signed by the City Treasurer and countersigned by the
60 Mayor.

What is this but the acknowledgment of a debt? A debt created by the holder lending money to the City Council, and the promise of the City Council to redeem the certificate by paying the debt at a day certain, and paying interest at a specified rate and fixed periods of time.

Is not this, in the language of Associate Justice Wayne, "expressive of a contract?"

If a contract, is it not that particular thing with which the State cannot, by any Act, interfere, so that it will impair its
61 obligation?

Is it not then a case in which this Court will see the obligation enforced, although the Supreme Court of the State has decided otherwise?

If the evidence of the debt, instead of a certificate in this form, were a promissory note, or a due bill, or any other form in which admission of indebtedness had been made, held by a non-resident; and the City Council should deduct from the face of it a certain portion of it as a tax due to it, and claim the right to do by a law of the State, could we hesitate in saying that, by such law, the State had impaired the obligation of 62
the contract?

The authority given to the City of Charleston to contract this debt, and the obligation of the city to discharge it, has been conclusively settled in the Courts of the State.

Cope vs. Charleston, 10 Rich. Law R., 491.

Gage vs. Charleston, 3 Rich. R. (N. S.), 491.

What is it which Chief Justice Moses says is implied? The right to tax. This if it exists, "in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which 63
the will of each State or corporation may prescribe."

Concede that it was an attribute of sovereign right, however inconsistent with the moral rule, that a State could impair the obligation of its contract. The State has parted with it, by the adoption of the Constitution.

If it had not parted with it, it could then, by acting directly on the contract, not only impair, but extinguish its obligation.

To do so directly is no longer possible; can it do so indirectly? Can it impair the obligation of the contract, and call it the exercise of the power to tax? 64

Could the State authorize one of two parties to a contract to escape the obligation he assumed? Could it give to an artificial creature of its own, which it calls a municipal body, that which it could not do for a natural body?

There is great force in the dissenting of Associate Justice Willard, when he says, "the grant of authority to the City Government to tax is limited by the nature of taxation and the rules of law governing its exercise, and where the statute is silent on the subject, the courts are competent to apply the

65 limitations thus imposed by the recognized principles applicable to the case." Can the city (he asks) "impose upon the non-resident holder of its obligation any part of the duty of supporting the municipal government. It is clearly against reason and justice. It is a case of a debtor claiming support from his creditor while acquiring the means of paying his debt." "It is simply an abuse of the taxing power." Associate Justice Willard does not consider the point of the obligation of the contract being impaired, because he thinks the power to tax is not authorized; holding that the *situs* of the stock
66 is not in the city of Charleston. Chief Justice Moses holds that the *situs* is in the city of Charleston; and that the stock is taken with the assent of the holder to a tax to be levied on it.

It is submitted, that this certificate—a mere chose in action—evidence of a debt—is subject to the law of personalty, and its *situs* is fixed in the domicil of the owner. He is a citizen of another State, a non-resident of the city of Charleston; and therefore, both the owner and the property are beyond the jurisdiction of the City Council.

67 And if the *situs* of the stock were in the city of Charleston, no law at the time of the creation of the debt reserved to the City Council power to tax it: the exercise of that power does in fact impair the obligation of the contract, and is in violation of the Constitution of the United States, which forbids such an act to be done by the State or by its authority, whether attempted directly, or indirectly under the assumed authority to levy a tax.

A. G. MAGRATH.

In the Supreme Court of the United States.

OCTOBER TERM. 1877.

THOMAS C. JENKINS,
Plaintiff in Error,
vs.
THE CITY COUNCIL OF CHARLESTON,
Defendant in Error.
No. 237.

STATEMENT OF THE CASE.

The plaintiff in error, a citizen of Maryland, domiciled and resident in Baltimore, became the owner and holder, as to part before and as to the rest after the 1st of January, 1870, of $23,099.64 of the stock of the City Council of Charleston, the defendant in error, a municipal corporation created by the laws of South Carolina. (Trans. fol. 11.)

This stock is the written evidence of a promise of the corporation to pay the sum of money named therein, with interest at the rate of six per centum per annum, payable quarterly.

The City Council has refused to pay to the plaintiff in error $871.69 of the interest which became due on this stock on the 1st of January, 1870, and on various days since then, and this action was brought to recover this unpaid interest. (Trans. fol. 12.) The City Council defended its refusal to pay these sums on the ground that it had imposed a tax of two per centum per annum on the principal of the plaintiff's stock, and that the sums in question were retained in payment of that tax. (Trans. fol. 12.)

The Court of Common Pleas, before which the case was tried, held that the City Council had the right under the

laws and Constitution to levy this tax, (Trans. fol. 12,) and gave judgment for the defendant.

The plaintiff thereupon appealed to the Supreme Court of South Carolina on the ground that the plaintiff not being a resident of South Carolina, the laws of South Carolina authorizing the taxation of his stock impaired the obligation of a contract, and was therefore in violation of the Constitution of the United States. (Trans. fol. 13.) That court affirmed the judgment of the Common Pleas. (Trans. fol. 30.) The plaintiff thereupon sued out t his writ.

Assignment of Errors.

Now comes the defendant and says that the Supreme Court of South Carolina erred in the following matters:

1. In holding that the laws of South Carolina authorizing the taxation of the stock of the plaintiff, who was not a resident of South Carolina, did not impair the obligation of a contract, and were not in violation of the 10th Section of the 1st Article of the Constitution of the United States.

2. In affirming the decree of the Court of Common Pleas.

Brief of Argument.

The City Council of Charleston derives its right to withhold the money due to the plaintiff by its contract with him, from the power of taxation granted by its charter, which is a law of South Carolina.

The court below held in effect (though not in words) that the laws of South Carolina gave this right. The decision on that point cannot be reversed here.

R. R. Co. *vs.* Jackson, 7 Wall., 266.

The court below further decided that laws of South Carolina, although they gave the right to the City Council to withhold, in the exercise of the taxing power, money due to a non-resident, did not impair the obligation of a contract, and were not in violation of the 10th Section of the 1st Article of the Constitution of the United States.

That is the only question in this court.

That such a law impairs the contract taken by itself is clear. "A law which alters the terms of a contract by imposing new conditions or dispensions with those expressed, is a law which impairs its obligation; for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement."

R. R. Co. *vs.* Pennsylvania, 15 Wall., 330.

But it is said that the right of taxation is implied in every contract, unless the intention to surrender it is shown by plain and unmistakable intent. (Trans. fols. 16, 17.)

The cases relied on by the court below, as instances of the right of a State to deal with contracts, are all cases of charters which are grants. The contracts under consideration were very different from the one sued on here, which was a promise to pay money. The precise question here presented was not decided in those cases.

This court has decided that the State could not tax a debt due by a private corporation to a non-resident. The State of South Carolina has carried the power of taxation further than has been heretofore attempted. It permits a municipal corporation, its own creature, to tax a debt due by it to a non-resident.

It is submitted—

1st. That the surrender of the right to tax is shown in this case by plain and unmistakable intent.

2d. That the withholding of the debt due to the plaintiff, a non-resident, was not an exercise of the power of taxation.

I. As to the first point.

By the mere fact of promising to pay a sum certain, the City Council manifested the intention to relinquish taxation on this debt. The burthen was upon it of expressly reserving any right which impaired the express terms of the contract.

II. But the act complained of here is not a legitmate exercise of the taxing power.

It is for the court to decide if an act claimed to be done in exercise of the taxing power is a legitimate act of taxation.

Cooley on Taxation, p. 35.
McCullough *vs.* State of Maryland, 4 Wheat., 428.
West River Bridge Co. *vs.* Dix., 6 How., 507.
Loan Association *vs.* Topeka, 20 Wall., 658.

There are two general principles applicable to the power of taxation:

1st. That individuals must be protected from double taxation.

Haight *vs.* R. R. Co., 6 Wall., 15.
R. R. Co. *vs.* Pennsylvania, 15 Wall., 321.

2d. That taxation and protection are reciprocal; that where there is no protection there cannot be taxation; that where there is protection of either person or property, there taxation is legitimate.

From these principles has been deduced the settled rule of law that a State may not tax a debt due by its citizens to non-residents.

Cooley on Taxation, pp. 14, 15.
People *vs.* McCreery, 34 Cal., 432.
R. R. Co. *vs.* Jackson, 1 Wall., 266.
R. R. Co. *vs.* Pennsylvania, 15 Wall., 300.
Tappan *vs.* Merchants' Nat. Bk., 19 Wall., 499.

A fortiori, the State may not tax a debt due to non-residents by a municipal corporation of its own creation.

But a distinction is taken based on the following passage from R. R Co. *vs.* Pennsylvania:

"It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will in many cases determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies and circulating notes of banking institutions. The former by general usage have acquired the character of and are treated as property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are."

Pp. 323, 324.

To this there are several answers. If the distinction is well taken, then—

1st. The situs of the plaintiff's scrip was Maryland.

There was not a particle of proof that the plaintiff's scrip was in South Carolina. The ordinance did not impose the tax on it on the ground of its actual situs in South Carolina. The mode of collecting the tax, viz., by deductions from the interest falling due, was an admission that neither the person of the plaintiff nor his stock could be otherwise reached.

But the stock must be presumed to have had its situs in

Maryland, both as matter of law and from the known course of owners of securities in keeping them under their immediate control.

2d. The plaintiff's stock was not a municipal bond within the meaning of the passage cited. The distinction was meant to be taken in respect of negotiable securities. This stock was not of that class; it contained no words of negotiability; it could be transferred only at the treasury of the City Council. (Trans. fol. 28.)

But the distinction suggested is open to these observations:

It was in the case in which it occurs *obiter dictum*.

It does not announce a rule of law, but a fact, viz., a usage which had grown up in regard to municipal bonds.

The distinction is not within the reasons of the rule exempting debts due to non-residents from taxation.

As before stated, such debts are exempted on two grounds: 1. To prevent double taxation. 2. Because there is no right to tax where there is no protection.

The plaintiff's stock may be subjected to taxation in Maryland. In the language of the court in R. R. Co. *vs.* Pennsylvania it is of the class of "property held in other States where it is subject or may be subjected to taxation upon an estimate of its full value."

Neither the person of the plaintiff nor his property is under the protection of the laws of South Carolina.

There is nothing to distinguish the security held by the plaintiff in error from the bonds declared not to be taxable by this court in R. R. Co. *vs.* Pennsylvania. This security is within the reasons of that decision.

15 Wall 307. 31 L. ed.
7 Wall.
20 Wall 658
19 Wall 499
9 Wall
14 Pet 563
7 Wall 69
Gibbons v. Ogden
7 How 324
24 How 329
18 How 479
3 Dal Dunlap 454
5 Wheat. 420
11 How 203
Swan v. 448